30 months. The plaintiff claimed damages in the sum of $4,500 under item (c) of the "Particulars of Special Damages" in the statement of claim. Such claim was allowed by the court.

When the timber company was wound up, the plaintiff attempted to look for employment in a timber company but failed to find an employer who was willing to employ him. The plaintiff had to be satisfied being a free-lance Book-keeper earning about $200 per month. The court was of the view that even if the plaintiff were employed by a timber company after the former timber company was wound up, the plaintiff would not be able to perform the work of a field supervisor due to the injuries sustained by him in the accident. A field supervisor has to pay frequent visits to the concession area and has to walk on foot for considerable distances, which would not be possible for the plaintiff to do under his present condition. As such, the plaintiff had lost certain amenities which was available to him before the accident. The plaintiff's earning capacity was affected and it had caused, in the opinion of the court, a loss of income of $150 per month. At the date of the trial, the plaintiff was 43 years old. Bearing in mind the nature of employment the plaintiff was able to take, it was probable that he would still be able to carry out effectively the work of a chief clerk until he attained the age of 55 years. Allowing any unforseen contingencies the court allowed 10 years' purchase. It would be reasonable for the court to award general damages for partial loss of future earnings in a sum of $13,899.13 less income tax based on 10 years' purchase at $150 per month.

For pain and suffering and for loss of amenities, the court found it reasonable to award a sum of $5,000. For the shortening of 3 cm of the right leg, $20,000 was considered reasonable. Thus, a global sum of $25,000 at 6% interest from date of service of the writ till date of realisation was awarded as general damages.

The parties had agreed that the defendants shall pay the plaintiff a sum of $86 for fees in relation to the police report, sketch plan, medical report and so on.

The court was of the view that the taxi fare to and from Malacca General Hospital was about $20. It was reasonable for the members of the plaintiff's family to visit him while the plaintiff was hospitalised. According to the plaintiff, the family visited him sometimes twice a week. The court found that it was reasonable for the members of the family to have made 10 trips and so awarded a sum of $200 under this item. The plaintiff was treated as an outpatient at the Orthopaedic Outpatient Department of the General Hospital Malacca. The court was satisfied that the plaintiff made 18 trips for this purpose and awarded a sum of $360 under this item.

Costs were awarded to the plaintiff as may be taxed.

Order accordingly.

Solicitors: *A.L. Looi; Wong & Paramjothy.*

QBE INSURANCE LTD. v. HASHIM BIN ABDUL & ANOR.

[A.C.J. (Syed Agil Barakbah J.) October 30, 1980]
[Alor Star — Civil Appeal No. 6 of 1979]

Insurance — Road accident — Third Party Notice served on Insurance company — Application to remove Notice — Road Traffic Ordinance, 1958, s. 80(1).

Road Traffic — Third Party Notice Served on Insurance Company — Whether necessary — Road Traffic Ordinance, 1958, s. 80(1).

The appellants in this case were the successors of the Bankers and Traders Insurance Co. Ltd. The learned magistrate on April 3, 1978 granted leave to the second defendant in Civil Action No. 80 of 1978 to issue and serve a Third Party Notice on the appellants and for the latter to be added as such. The said Order was granted on an *ex parte* application.

In the civil action the two infant plaintiffs filed a writ suing through their father and next friend against the defendants claiming injuries sustained as a result of an accident involving a bicycle ridden by the plaintiffs and a motor van driven by the first defendant as agent of the second defendant, the Ketua Pengarah Pelajaran, State of Kedah. The appellants subsequently applied to set aside the Order but the application was dismissed by the learned Magistrate. They appealed against the whole of the said decision.

Held, allowing the appeal: (1) in construing sub-section (1) of section 80 the learned Magistrate failed to consider that the statutory liability of the insurance company to pay any claim made against the insured, i.e. the second defendant, commences when judgment in respect of such liability as is covered by the terms of the policy is given against the insured. Such judgment being a condition precedent, no liability can be attached to or imposed upon the insurers until and unless judgment has been obtained;

(2) in any case falling within the ambit of the provision of sub-section (1) of section 80, as the present case under appeal, payment by the insurers to the third party is guaranteed by the sub-section provided the other conditions stated therein are fulfilled. On this point alone there is no legal requirement to serve any Third Party Notice on the Insurance Company with a view to ensuring their statutory liability to indemnify the injured third party;

(3) the learned Magistrate had therefore erred in not setting aside the Third Party Notice.

Cases referred to:-

(1) *New Zealand Insurance Co. Ltd.* v. *Sinnadorai* [1969] 1 M.L.J. 183.
(2) *Harman* v. *Crilly* [1943] 1 K.B. 168.
(3) *Jones* v. *Birch Brothers Ltd.* [1933] 2 K.B. 597.
(4) *Scott* v. *Avery* 10 E.R. 1121.
(5) *Carpenter* v. *Ebblewhite & Ors.* [1939] 1 K.B. 347.

CIVIL APPEAL.

Danny Chandran for the appellants.

Josephine Premla Sivaretnam (Miss) (Federal Counsel) for the respondents.

Brijnandan Singh Bhar for the plaintiffs.

Syed Agil Barakbah J.: The appellants, the QBE Insurance Limited, are the successors of the Bankers and Traders Insurance Co. Ltd. on whom leave was granted by the Magistrate, Jitra on April 3, 1978 to the second defendant in Civil Action No. 80 of 1978, to issue and serve a Third Party Notice and for them to be added as such. The said Order was granted on an *ex parte* application. In the civil action the two infant plaintiffs filed a writ suing through their father and next friend, against the defendants claiming damages for injuries sustained as a result of an accident

which occurred while they were riding a bicycle from the direction of Jitra towards Kodiang, when they were knocked down by a motor van KA 7558 driven by the first defendant, as agent of the second defendant, the Ketua Pengarah Pelajaran, State of Kedah.

The appellants subsequently applied to set aside the Order but the application was dismissed by the learned Magistrate. They have now appealed against the whole of the said decision.

There are four grounds of appeal as the second ground was not proceeded with.

Grounds (1) and (3) are dealt with together i.e. whether the second defendant has any *locus standi* or legal right to apply for the issue and service of such notice since the Government of Malaysia is the true and legal owner of the motor van. As the latter has not been joined as a party to the civil action, it was submitted such action is therefore not properly before the court and it cannot thereby be judicially adjudicated upon according to law and legal procedure.

Now, from the affidavit of the Federal Counsel in the Attorney-General's Chambers filed in the court below (page 12 paragraph 3) and other undisputed facts, the said vehicle belongs to the Government of Malaysia and is registered in the name of the Chief Education Officer, Kedah, (the second defendant) who loaned it to the Headmaster of the Sekolah Menangah Sultan Abdul Halim, Jenan, Jitra, Kedah. The said vehicle was insured at all material times with the Bankers and Traders Insurance Co. Ltd. against third party risks, by the said school authorities as the insured. The first defendant was also employed by the Government and seconded to the said school as driver and indirectly is the employee of the school.

In the light of the above I think it is immaterial whether the Government of Malaysia or the Chief Education Officer, Kedah is made a party to the action. As an employee of the former and the registered owner of the vehicle involved in the accident the latter has a *locus standi* or a legal right to apply for the service of a Third Party Notice. The civil action is properly before the court and can thereby be judicially adjudicated upon.

The other two grounds are more important. It was submitted that in granting the order to issue and serve upon the appellants a Third Party Notice and in dismissing the application by the latter to set aside the order, the learned Magistrate misconstrued the provision of section 80(1) of the Road Traffic Ordinance, 1958. The subsection states: —

"80.(1) If, after a certificate of insurance has been delivered under subsection (4) of section 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments."

The law as to the insurers' statutory obligation towards third parties is set out in paragraph 769 on page 375 of 22 *Halsbury's* Laws of England (3rd Edition) as follows: —

"The first condition of the obligation of the insurers is that there is a judgment. The second condition is that the judgment must be in respect of a liability which is required to be covered by compulsory insurance. In other words the only person who can maintain a right of action direct against the insurers is a person falling within a limited class of third parties whose bodily injury or death is required to be covered by a motor policy. The third condition is that the liability is in fact covered by the terms of the policy or would be covered by the policy but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled the policy."

The above deals with section 10(1) of the English Road Traffic Act, 1934 which is *in pari materia* to our subsection (1) to section 80.

It is clear from his grounds that in construing subsection (1) of section 80 the magistrate failed to direct his mind that the statutory liability of the Insurance Company to pay any claim made against the insured i.e. the second defendant commences when judgment in respect of such liability as is covered by the terms of the policy is given against the insured. Such judgment being a condition precedent, no liability can be attached to or imposed upon the insurers until and unless judgment has been obtained.

Secondly the reason for the application of a Third Party Notice is because the Insurance Company intended to avoid liability for any damages arising out of the accident as stated earlier. The learned Magistrate feared that if the insurers were not brought in as Third Party, they would be absolved from liability to indemnify the injured party and in the circumstances he was of the opinion that the whole effect of section 80(1) would be defeated.

The effect of the section is sufficiently considered by H.T. Ong C.J. (as he then was) in *New Zealand Insurance Co. Ltd.* v. *Sinnadorai*[1] with which I agree with respect. On page 184 his Lordship says: —

"The marginal note describes it as the 'duty of insurers to satisfy judgments against persons insured in respect of third party risks'. This duty is, of course a liability to indemnify the policy holder (including whomsoever may be insured by the policy) against judgments obtained by a third party. The third party is in fact in a better position than the insured himself because it is declared that 'notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the claim of the third party nevertheless prevails. The insurers are then left to their remedy of seeking recourse, if they can, against the insured for having paid out on his behalf what they claim to be contractually absolved from paying.

The insured's right to be indemnified is naturally a valuable chose in action...."

In short in any case falling within the ambit of the provision of subsection (1) of section 80, as the present case under appeal, payment by the insurers to the third party is guaranteed by the subsection provided the other conditions stated therein are fulfilled. On this point alone, there is no legal requirement to serve any Third Party Notice on the Insurance Company with a view to ensuring their statutory liability to indemnify the injured third party.

The English authorities cited may differ from this view because the issues involved relate to the terms of the insurance policy. In *Harman* v. *Crilly*[2] the Court of Appeal allowed the insurance company to be made a third party in an action for personal injuries when the action is tried by a judge alone on the ground that there was no possible reason for suggesting that the presence of the insurance company as a third party will be calculated to embarrass or prejudice the fair trial of the action. However the issue between the defendants and the insurance company related to the construction of the insurance policy itself in view of certain events which took place after the transfer of the business and the lorry and the matter of payment of premiums by the defendant company and their acceptance by the insurance company. Earlier in *Jones* v. *Birch Brothers Ltd.*[3] the main issue of which referred to an arbitration clause which requires reference to arbitration in the event of any difference between the insurance company and the insured under the policy, the Court of Appeal agreed to the stay of third party proceeding made by the trial judge because they might have the result of rendering the policy inoperative. The *Scott* v. *Avery*[4] part of the arbitration clause was merely an agreed additional way of enforcing the agreement and was not affected by section 38 of the Act of 1930. However in *Carpenter* v. *Ebblewhite & Ors.*[5] the Court of Appeal granted the defendants' application to strike out the plaintiff's claim as against the insurers for a declaration that they were obliged to satisfy any judgment obtained by the plaintiffs against the defendants in an action for damages for negligence for injuries suffered in a road accident. This was not a third party application but the principle applied was that the liability of the insurers has not arisen before any judgment has been obtained in a dispute between the plaintiffs and the defendants and in the absence of any actual dispute between the plaintiffs and the insurers, the court has no power to make a declaration of the insurers' liability.

The present case as I have said, depends on the provision of subsection (1) of section 80 of the Road Traffic Act. I therefore hold that the learned Magistrate erred in not setting aside the Third Party Notice. The appeal is allowed with costs. The third party order is accordingly set aside.

Appeal allowed.

Solicitors: *R. Rajasingam & Co.; Brijnandan Singh Bhar & Co.*

THANGAVELU v. CHIA KOK BIN

[O.C.J. (Sim J.C.) July 14, 1981]
[Kuala Lumpur — Civil Suit No. 3272 of 1977]

Torts — Negligence — Damages — Boy of 13 years old knocked down by motor car — Boy in state of coma after accident until death — Not totally unconscious — Claim for pain and suffering — Claim for loss of expectation of life — Claim for loss of dependency — Claim for loss of future earnings — Civil Law Act, 1956, ss. 7 & 8 — Interest.

Damages — Fatal accident — Boy in state of coma after accident until death.

In this case the plaintiff's son was killed in a road accident and the plaintiff sued as administrator of the estate. Liability was agreed at 50/50 and the dispute was as to quantum of damages. The boy was aged 13 and was working part time for a Chinese contractor. After the accident he was in a state of coma but not totally unconscious until he died. The claims were as follows:

(1) Claim for pain and suffering;

(2) Claim for loss of expectation of life, under section 8 of the Civil Law Act;

(3) Claim for loss of dependency under section 7 of the Act;

(4) Claim for loss of future earnings under section 8(2)(c) of the Act;

(5) Special Damages agreed at $850.00.

Held: (1) in this case there was an element of pain and suffering as the patient was not totally unconscious after the accident and the sum awarded would be $20,000 for pain and suffering and loss of amenities;

(2) the amount for loss of expectation of life would be assessed at $4,000;

(3) there was loss of dependency in this case and the amount would be assessed at $14,185.60;

(4) it is well settled law that the plaintiff is entitled under section 8(2)(c) of the Civil Law Act to claim damages for loss of future earnings of his son for the benefit of the estate. The amount for loss of future earnings would be assessed at $13,456.80;

(5) as the award for the benefit of the estate under section 8 exceeds the award for loss of dependency under section 7 the claim under section 7 is eliminated or extinguished by the amounts to be awarded under section 8 of the Civil Law Act, 1956.

Cases referred to:-

(1) *Andrews* v. *Freeborough* [1966] 2 All E.R. 721.
(2) *Wise* v. *Kaye* [1962] 1 Q.B.D. 638.
(3) *How Ke Ling* v. *Gui Tiang Siang* F.C. Civil Appeal No. 172 of 1978.
(4) *Cookson* v. *Knowles* [1977] 2 All E.R. 820; [1978] 2 All E.R. 604.
(5) *Pickett* v. *British Rail Engineering Ltd.* [1979] 1 All E.R. 774.
(6) *Oliver* v. *Ashman* [1961] 3 All E.R. 323.
(7) *Kandalla* v. *British Airways Board* [1980] 1 All E.R. 341.
(8) *Gammell* v. *Wilson & Anor.* [1980] 2 All E.R. 557.
(9) *Gammell* v. *Wilson & Ors.* [1981] 1 All E.R. 578.
(10) *Raja Mokhtar bin Raja Yaacob* v. *Public Trustee, Malaysia* [1970] 2 M.L.J. 151.
(11) *Murtadza bin Mohamed Hassan* v. *Chong Swee Pian* [1980] 1 M.L.J. 216.

CIVIL SUIT.

R.K. Nathan for the plaintiff.

K.W. Woo for the defendant.

Cur. Adv. Vult.

Sim J.C.: An accident took place on November 9, 1974, when a cyclist on the Kuala Lumpur/Kajang